STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ALTMAN MANAGEMENT COMPANY,

Plaintiff,

Vs

AON RISK INSURANCE SERVICES WEST, INC.,

Defendant,
_____/

Case No. 13-1106-CK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan, on the 8th day of June, 2015

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This matter is before the Court following a non-jury trial held on April 27, April 30, and May 1, 2015. Plaintiff has two claims, one for breach of contract and one for negligence. Plaintiff is requesting judgment in its favor in the amount of $3.5 million plus attorney fees. Defendant moved for involuntary dismissal under MCR 2.504(B)(2) after the Plaintiff rested. The Court declined to render any judgment until the close of all evidence. Defendant renewed its motion for involuntary dismissal at the close of the Defendant's case. The parties requested the opportunity to file post-trial briefs, which they did on May 18, 2015. The Court took all matters under advisement to issue written findings of fact and conclusions of law.

Plaintiff Altman Management ("Altman") is a regional company that develops and manages apartment buildings in Michigan, Florida, and several other states. Defendant Aon Risk Insurance Services West, Inc. ("Aon") is an insurance brokerage firm. Altman and Aon began their relationship in 2007. At that time, Aon began procuring insurance for Altman on Altman's properties.

Tim Peterson, the Chief Financial Officer for Altman, testified that Aon was selected because their client service was unmatched. Aon was the gold standard in insurance brokerage and they provided white glove service. When Aon pitched their service to Altman, Aon stressed their tremendous resources all brought together in one point of contact. That point of contact was Mike Rosenbach, through whom all of Altman's needs and communications would be funneled.

When the relationship began in 2007, Rosenbach was an Account Executive at Aon. He reported directly to Aon's Senior Vice President. There were several divisions under Rosenbach in the organizational chart, including a Claims Division. From January 2008 to January 2011, Diane Gerometti was the Aon claims consultant who serviced Altman. At the beginning of January 2011, Gerometta e-mailed Marisa Crescenzi, an administrative assistant at Altman, (with a cc to Rosenbach) saying that Ron O'Neill would be taking over the Altman account. The e-mail directed Crescenzi to report claims directly to O'Neill. Rosenbach intervened with his own e-mail sent internally to others at Aon saying that Gerometta would be replaced with Wayne Brinkman instead of O'Neill. He further directed Brinkman to get in touch with Gerometta to be updated on a number of claim issues going on at the time. (Plaintiff's Ex. 33).

Rosenbach continued in his position as Account Executive after Gerometta was replaced with Brinkman. Gerometta testified that Rosenbach was the captain of the ship and Brinkman agreed that Rosenbach remained the point person for the Altman account. Both denied that Rosenbach had any role in reporting claims to the insurance carrier.

Derek Lubsen is the director of asset management at Altman. He started working for Altman in January 2008. His first encounter with Aon was at a September 2010 meeting attended by Peterson and Rosenbach. Rosenbach was known to Lubsen as the point person for Altman's dealings with Aon. In fact, Lubsen was told that his direct line of communication with Aon should be through Rosenbach. Anything at all that Lubsen needed from Aon was to go through Rosenbach. In the time period of January 2011 to June 2011, Lubsen was handling a broad range of insurance matters for Altman and he was reporting directly to Peterson.

Otero Lawsuit

In January 2010, Carmen Otero was found non-responsive in her apartment in Central Towers, a property in Detroit owned and managed by Altman. She is alleged to have suffered from carbon monoxide poisoning and allegedly was severely and permanently injured. In June 2011, a lawsuit brought by the Guardian of Carmen Otero against Altman was filed in the Wayne County Circuit Court. The summons and complaint were served on Diane Karst, the resident agent at Altman's headquarters in Boca Raton, Florida.

Plaintiff's Exhibit 1 is the June 20, 2011 e-mail chain with attachments that is the genesis of this case. Karst sent the summons, complaint, and attached discovery

requests via e-mail to Peterson and Cathy Cabell, the senior vice-president of Altman. Peterson forwarded everything to Lubsen and Judi Mann (Human Resources Director for Altman) with a copy also back to Cabell and to Roberto Lavalli (President of the Midwest region with responsibility for overseeing Altman's Michigan properties), and Carol Loveless (vice-president of the Midwest).

The e-mail from Peterson to Lubsen and Mann reads "Derek & Judi- Looks like we should notify the insurance company. Thanks, Tim." Lubsen immediately forwarded all the documents on to Rosenbach at Aon. Lubsen's e-mail reads "Hi Mike. Please see the attached summons regarding Central Towers in Detroit, MI. Please let me know who will be handling this. Thank you." Lubsen cc'd Rose Kubler (President of Risk Innovations, Inc. and a risk consultant for Altman), Peterson, Mann, Lavalli, Loveless, and Cabell.

It is undisputed that Lubsen forwarded the summons, complaint, and discovery requests to Rosenbach. It is undisputed that Rosenbach received the e-mail and the attachments. Although Lubsen cc'd multiple people on his e-mail to Rosenbach, all of those people were with Altman. The only person at Aon that Lubsen sent the documents to was Rosenbach. Rosenbach took no action. Lubsen took no further action, except for an additional e-mail on June 23.

There was further communication about the lawsuit. Mann was unable to find an incident report for the matter and asked Loveless to forward any background information on it to Lubsen. Lubsen was cc'd on that e-mail, which was also on June 20, 2011. Peggy French e-mailed Lubsen on June 22, 2011 asking for information needed to answer the interrogatories regarding insurance. On the same day, French

also e-mailed Mann and cc'd three other Altman employees. The purpose of this e-mail was also to gather information needed to answer the interrogatories. (Defendant's Exhibit 34).

Mann acknowledged receiving a copy of the Otero lawsuit in the e-mail from Peterson to Lubsen and Mann. Mann printed out the e-mail and gave it to Creszinski. She asked Creszinski to set up a file on the matter. Creszinski set up a file, but because Mann was the person who handled lawsuits, Creszinski took no further action.

On June 23, 2011, Lubsen e-mailed Kugler with the subject "Summons for Altman Management Company" and said "Hi Rose. Just wanted to check with you first….should I send this to Mike at AON and let him reply?" It would appear he was referring to replying to the interrogatories because Kugler responded:

> Aon can really answer only interrogatories #1 and 2, by providing info on the general liability policy (question #1) and umbrella (#2) in force at the time of alleged incident. Answer to #3 is NO. All others are site operations specific, and they should be answered by the property manager and maintenance supervisor. That said, however, you should still ask Aon what adjuster and attorney your insurer is assigning this claim to, and run the answers by him/her before anything goes back to plaintiff attorney.

Lubsen testified that despite Kugler's suggestion that he follow up with Aon, he did not do so because only three days earlier he had forwarded everything to Rosenbach and asked him to let him know who would be handling the matter. Lubsen had never before had to follow up with anything that Rosenbach was handling and he did not feel it necessary to do so this time. He felt that as the top insurance broker in the world, Aon should have handled the matter without the need for him to follow up.

Mann also did not follow through on the lawsuit. She saw from the e-mail that Lubsen had forwarded the Otero lawsuit to Rosenbach and she assumed she had nothing further to do.

Rosenbach had no recollection of receiving the June 20 e-mail from Lubsen, but he does not deny that he received it. He admitted that had he noticed Brinkman was not cc'd on the e-mail, Rosenbach would have forwarded it to Brinkman himself. Brinkman said that Rosenbach does nothing regarding claims, but also admitted that Rosenbach should have sent the lawsuit to him because Rosenbach knew that Brinkman was the one who handled claims.

On July 25, 2011 a default was entered against Altman for failure to answer the complaint. On August 12, 2011, Otero's attorney mailed a copy of the default to Joel Altman, the chairman and founder of Altman, at his Okemos address. Joel Altman's first recollection of hearing about the lawsuit was in March 2012, when Otero filed a motion for default judgment. On that same date, an attorney assigned by Altman's insurance company, Tudor, filed an appearance. Altman's attorney also filed a motion to set aside the default. On August 14, 2012, the Wayne County Circuit Court denied Altman's motion to set aside the default.

When Crescenzi learned of the motion for default judgment in March 2012, she sent the lawsuit via e-mail to Brinkman saying "This one fell through the cracks and an incident report was never filed and I was not copied on the correspondence so unfortunately it was never submitted to you."

As the Wayne County case was proceeding to trial on the issue of damages, Otero and Altman entered into an arbitration agreement. The arbitration agreement

provided for a high/low arrangement of no less than $3.5 million and no more than $10 million. The arbitrators unanimously awarded $3.5 million.

Altman filed this lawsuit against Aon requesting damages in the amount of the $3.5 million judgment entered against it in the Otero matter. Altman's claims are for breach of contract and negligence, based on the failure of Aon to forward the Otero lawsuit to Altman's carrier or take any further action on the Otero lawsuit.

Claims handling

Marisa Crescenzi began working for Altman in December 2009. In June 2011, she was an administrative assistant to Cathy Cabell, the senior VP of operations. As part of her duties, she handled all incident reports that came to Altman from the property managers of Altman properties. She would create a file and then send a copy to the insurance broker. She determined who the broker was by a list that was kept.

For Central Towers, her procedure was to forward the incident to Rosenbach with a copy to Gerometta, Loveless and Lubsen. Then she would receive an acknowledgement back from them that it was received and they would follow up on it. The next information she would receive was the name of the adjuster. She printed out all e-mails received and kept them in the file she created. When Brinkman became the primary contact, Rosenbach became one of the people who would be cc'd on the e-mail.

Crescenzi kept a detailed log for all incidents from the smallest matter all the way up to lawsuits. The log documented the property involved, the date of the incident, the claimant's name, the type of incident, the disposition, and the date, if any, that the incident was forwarded on to a third party. The log also had an update column that

included any additional information received about the incident and the disposition of the incident. The log included general liability claims and property claims. Mann knew of the log and saw the log. She directed that there be a section for ongoing incidents (Defendant's Exhibits 45, 46, and 47).

Lawsuits were handled differently because they were usually sent directly to Joel Altman and then Mann received them. Crescenzi would still set up a file, but Mann would forward the lawsuits. Crescenzi would not necessarily have been copied on an e-mail involving a lawsuit because Mann handled lawsuits.

Crescenzi would report lawsuits only upon direction from Mann. If Mann directed her to report a lawsuit, Crescenzi would forward it to Brinkman with a copy to Rosenbach. Brinkman would usually acknowledge that he received the e-mail within a day or so and he would send another e-mail when the adjuster's name was known.

Mann acknowledged that there was no written policy or procedure for handling claims. She did assist in compiling data and making sure files were put together when Altman received notice of complaints. She acknowledged that Crescenzi set up files, but it was not part of her regular duties. Mann said she consistently sent lawsuits to Rosenbach. He never told her not to send them to him. Mann knew that the normal course would be for an attorney or adjuster to call after a lawsuit was forwarded.

Contract modification

Initially, Aon was compensated on a commission basis. At some point, the parties entered into a written Compensation Agreement. At the time of the occurrences of this lawsuit, a Compensation Agreement was in place that covered the period December 1, 2010 to December 1, 2011.

Several provisions of the Compensation Agreement are relevant to this lawsuit. In paragraph 5 of Exhibit A – Part II – Scope of Services, Aon agreed to provide basic property and casualty claims consulting:

> Basic property and casualty claims consulting services consist of: (a) providing information as may be requested by You to enable You to provide notice to insurers whose coverages may apply to any circumstances, occurrences, claims, suits, demands and losses; (b) facilitating contact between You and the Insurer(s); (c) providing an overview of coverages that may be available to You under the applicable insurance policy; and (d) advising You on requirements for payment of a claim. Basic claims advocacy does not include claims notification to insurers and We do not provide, as part of the Services, legal representation, testimony or depositions.
>
> You acknowledge it is Your responsibility to take such steps as are necessary to notify directly those insurers whose coverages may apply to any circumstances, occurrences, claims, suits, demands and losses in accordance with and as may be required by the terms and conditions of the policies placed for You under this agreement. You may send copies of such notices to Us as may assist Us in carrying out services relating to claim advocacy and claim consulting as may be set forth above. We undertake no duty or responsibility to monitor Your obligation to place insurers' (sic) on notice of Your circumstances, occurrences, claims, suits, demands and losses nor to place Your insurers on such notice.

The Compensation Agreement provides that Aon is not responsible for reporting claims to Altman's insurance carriers. The Agreement further provides that any modifications must be made in writing.

Altman argues that the Agreement was modified by a course of conduct. A contract may be modified by a course of conduct even when the contract contains a no modification clause. *Quality Pro*ducts v *Nagel Pre*cision, 469 Mich 362 (2003). Parties must be free to contract. Along with being free to contract, they must also be free to modify their existing contracts. Thus, even a contract with an anti-modification clause

may be modified if the parties agree to modify it. It is essential that the modification is mutually agreed upon and not unilaterally imposed. Mutual agreement may be established by a written agreement, oral agreement, or affirmative conduct. The party claiming a modification bears the burden of showing mutual agreement to modify based on clear and convincing evidence.

Defendant's Ex. 84 was not admitted as evidence but Brinkman testified that it was an accurate listing of all losses submitted during the policy period 2010 to 2011. Although Defendant's Ex. 84 was not admitted, Aon used it as demonstrative evidence and Brinkman testified it was accurate. The summary of claims establishes that there was a course of conduct whereby the parties mutually agreed to Altman's submission of claims through Aon.

Aon maintains that there was no contract modification to report claims to Aon and even if there were such a modification, there was an established procedure for claims reporting. Altman maintains that the modification entailed reporting claims to Aon, but not in accordance with any specified procedure.

Defendant has argued that the pattern of claims submission during the 2010/2011 policy shows that Brinkman was the proper person to whom claims should be reported. The Court disagrees. Rosenbach did, in fact, have a role in reporting claims to the insurance carrier. Whether Rosenbach was the main recipient of the claims submissions or a cc'd recipient of the claims submission is not dispositive. Rosenbach received notice of all claims submissions in the 2010 to 2011 policy period. It was his acknowledged error to fail to do anything and to fail to notice that Brinkman had not been also notified. Had he noticed the Brinkman omission, he would have, and

should have, forwarded the lawsuit to Brinkman. Brinkman acknowledged this error also.

There is no evidence that Altman had an established procedure for reporting claims to Aon at any time up to and including the year 2011. Crescenzi kept a log that was very detailed and thorough. However, the log included only those incidents that Crescenzi knew about. She would typically receive an incident report from the property manager of the property involved. If a lawsuit was filed, it usually went to Mann and Mann would give it to Crescenzi for purposes of making a file. Lubsen, who oversaw all insurance matters, knew nothing of Crescenzi's log.

There is no evidence that Aon had an established procedure for receiving claims from Altman. Although the transition from Gerometta to Brinkman included instructions to report claims to Brinkman, Rosenbach continued to be in the role of point person for Altman and the person through whom all information flowed.

Contract modifications must be mutually agreed upon. The Court finds by clear and convincing evidence that Altman and Aon mutually agreed by a course of conduct to modify the Compensation Agreement to provide that Altman would report claims against it to Aon and Aon would notify the appropriate carrier. Beyond that modification, the Court finds no modification as to any particular procedure for reporting claims. Neither party had its own established procedure. If neither party had its own procedure, then it can hardly be said that there was mutual agreement to one established procedure.

Errors and omissions

The Compensation Agreement also provided for limits on Aon's liability to Altman:

> To the fullest extent permitted by law, ARS and Aon Group shall have no liability for any claim or liability asserted by You or any Altman Group Member for any loss arising by reason of, or arising out of any error or omission by You or any Altman Group Member including any failure to comply with Your duty of disclosure. Should any claim or action be brought against ARS or any Aon Group Member due to an error or omission by Client or any Client Group Member, Client shall indemnify ARS for all damages or losses arising from such error or omission.

After the initial e-mails in the time period June 20 to June 23, 2011, no further action was taken by Altman with respect to the Otero lawsuit. Joel Altman and Peterson learned in March 2012 that there was a motion for a default judgment and that Altman was not defended in the suit.

The Court is considering only what transpired up to July 25, 2011, when the default was entered in the Otero lawsuit. Once the default was entered, there is nothing else that Altman did or did not do that contributed to the loss. The Wayne County Circuit Court's decision not to set aside the default did not take into account the timeliness of Altman's motion.

The Court finds that Altman made multiple errors and omissions in the handling of the Otero lawsuit from June 20 to July 25. Lubsen e-mailed the lawsuit to only one person at Aon. Although he asked Rosenbach to let him know who would be handling the lawsuit, Lubsen never followed through when Rosenbach did not respond. The errors and omissions are not Lubsen's alone. Mann was cc'd on the e-mail to Rosenbach. She typically handled the reporting of lawsuits. Although she informed Crescenzi to set up a file, she also did not follow through to determine any further status of the lawsuit.

The efforts to answer the interrogatories appear to have been dropped after the June 23 e-mails. Had anyone followed through with having the interrogatories

answered it would have certainly revealed the breakdown in communication and that no attorney had been assigned for Altman.

Aon was undoubtedly also negligent in its handling of the Otero lawsuit. Rosenbach does not deny receiving the June 20 e-mail even though he has no recollection of it. Had he noticed the e-mail, he agreed that he would have known to forward it to Brinkman. Likewise, Brinkman readily agrees that Rosenbach should have forwarded the e-mail to Brinkman.

The issue is the interpretation of the indemnity clause in the Compensation Agreement. Altman maintains that it did not indemnify against Aon's own negligence. Aon maintains that any loss that arises out of an error or omission by Altman will cut off its own liability even if it too was negligent.

Altman relies on two cases in support of its position that the errors and omissions clause does not require Altman to indemnify Aon against Aon's own negligence. *MSI Const Managers, Inc* v *Corvo Iron Works, Inc*, 208 Mich App 340 (1995) and *Badiee* v *Brighton Area Schools*, 265 Mich App 343 (2005) are both distinguishable from the present case.

The contractual language in *MSI Const Managers* only indemnified the general contractor "to the extent" that the subcontractor was negligent. Therefore, where both parties were negligent, the subcontractor was only responsible for indemnifying the general contractor for the percentage of the subcontractor's negligence.

In *Badiee*, the contract language did not expressly cover indemnification by the contractor for the indemnitee construction manager's wrongful act. Because the language was lacking, the Court of Appeals followed *Paquin* v *Harnischfeger* Corp, 113

Mich App 43 (1982), and looked at other language in the contract, surrounding circumstances, and the purpose sought to be accomplished by the parties. *Badiee*, 353. The conclusion was that the indemnification was only intended to cover the contractor's actions.

The language in the Compensation Agreement in the present case is not limited, as in *MSI Const Managers*, and it is not absent, as in *Badiee*. The errors and omissions clause is expressly stated in the broadest possible terms. Aon has no liability for any claim made against Aon by Altman for any loss arising out of any error or omission by Altman.

Beyond the broad nature of the language is the fact that it covers any claim by Altman against Aon. Unlike clauses that cover third party liability but are silent with respect to claims between indemnitor and indemnitee, this clause focuses *only* on claims made by Altman against Aon. This language conclusively shows that the parties contemplated some claim by Altman against Aon, such as breach of contract or negligence, and that Altman agreed to indemnify Aon even if Aon was negligent. Only in the face of Aon's sole negligence would the indemnification clause not apply. Aon is not solely negligent.

Altman asks this Court to assist it in obtaining justice. Altman may have every right to be indignant over Aon's mishandling of its claim. One would not expect that a company at Aon's level would commit such an egregious error and cause its own client such enormous consequences. However, Altman freely contracted with Aon to indemnify Aon for Altman's own errors and omissions. When Altman did that, it took on the risk that it, too, would mishandle something as important as a multi-million dollar

lawsuit. Despite the risk, Altman made no standard internal procedures for handling claims against it. What procedure they did have was either not known by essential people at Altman or was not followed in this case by essential people at Altman. Per Altman's agreement, Aon is not liable.

The Court finds no cause for action by Altman and grants Aon's motion for involuntary dismissal made at the close of the case under MCR 2.504(B)(2).

IT IS HEREBY ORDERED that this case is **DISMISSED**.

This order resolves the last pending claim and closes this case.

/s/

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Hon. Joyce Draganchuk
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Order upon the attorneys of record by placing said Order in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on June 8, 2015.

/s/

_____
Michael G. Lewycky
Law Clerk/Court Officer